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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

THE PEOPLE,

Plaintiff and Appellant,

v.

AGAITITI TIMOTHY TOKIO,

Defendant and Respondent.

2d Crim. No. B207198  
(Super. Ct. No. 1215021)  
(Santa Barbara County)

Agaititi Timothy Tokio was charged with hitting another partygoer during a night of revelry in Isla Vista. His defense was that his football teammate Garry Vereen struck the blow. The trial judge, however, precludes Tokio and Vereen's coach from testifying to the facts and circumstances of Vereen's confession that he had committed the crime. At trial, Vereen admits his confession yet recants it. After Tokio was convicted of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1))<sup>1</sup> and simple battery (§ 242), the trial court granted his motion for a new trial pursuant to section 1181, on its finding that it had erred in excluding the coach's testimony. The People of the State of California now appeal from that order. We conclude that the court acted within its discretion in granting a new trial on this ground.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated.

Accordingly, we affirm.

## FACTS AND PROCEDURAL HISTORY

### *Prosecution*

At approximately 1:00 p.m. on October 22, 2006, Robert Lawrence was assaulted while attending a party at his friend's house in Isla Vista. Lawrence was highly intoxicated at the time and was unable to identify his assailant. The incident occurred while he was assisting his friend in "herding people out" of the house and front yard after the police warned them they would be issued a "noise violation." Lawrence recalled encountering a group of African-Americans outside and asking them to move down the street. The next thing he remembered "was me being on a stretcher, and my friends coming out, talking to me, and told me that I had just been hit." When he woke up in the hospital, he discovered he had a gash on his forehead and a "bump" on the back of his head. He got dressed and left the hospital shortly thereafter. Toxicology tests revealed that Lawrence's blood alcohol level at the time of his admission was .257.

Obiajulu Ikemefuna was acting as a "bouncer" at a party next door when he saw a group of men who appeared to be African-American arguing with a "very intoxicated" Caucasian man he later identified as Lawrence. One of the dark-skinned men was wearing a red football jersey and had a crutch, while another was wearing a blue-striped jacket. Ikemefuna saw Lawrence get "sucker punched" from behind and fall to the pavement. While he did not see who had thrown the punch, the man in the blue-striped jacket was standing in front of Lawrence, while the man in the red jersey was standing directly behind him.

At trial, Ikemefuna identified Tokio as the man in the red jersey.<sup>2</sup> Prior to trial, however, he was shown a six-pack with Tokio's photograph and said he would probably pick Tokio's photograph, yet added, "I don't think that's him." Ikemefuna also identified the man in the blue-striped jacket as Vereen.

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<sup>2</sup> While Tokio is Samoan, he acknowledged that "people frequently assume" he is African-American.

Karen Wait and Reif Lawson were standing together outside the residence when the incident occurred. Wait recalled that she was talking to Lawson when "a younger guy, like, fell on my leg." Wait then saw a man in a red shirt and carrying a crutch, who she later identified from a photograph as Tokio, "kick the guy who was on the ground" once or twice.

Lawson testified that he saw an individual wearing a red jersey and carrying a crutch hit Lawrence and then quickly walk away. Lawson recalled that the man in the red shirt was accompanied by another dark-skinned man who was similarly dressed. He also recalled that the victim was standing "face to face" with the man in the red jersey when he was hit. Lawson went to the victim and "dragg[ed]" him from the street to the sidewalk. He could not recall whether the victim was face down, and did not remember him falling on anyone. Lawson also could not remember whether he drank any alcohol that night. He was unable to identify Tokio as the perpetrator on the morning of the incident, nor was he able to identify him at trial. On cross-examination, he acknowledged telling the police that he wasn't sure which of the two men hit Lawrence. He also admitted that "[i]n my own mind today, I would not be able to positively I.D. one person being the puncher to a hundred percent accuracy."

Ani Yeghiazarian was standing in the street along with several others when the incident took place. Yeghiazarian saw Lawrence "collapse" on her friend Wait's leg, then saw a man in a red shirt and red hat who was carrying a crutch kick him once or twice. The man "walked away slowly" and took off his red shirt. Yeghiazarian acknowledged telling an investigator that the man in the red shirt "dragged and dropped the victim on the street."

Vereen, Carlos Spivey, Allen Page, Andrew Leasau, and Ryan Engsman were Tokio's roommates. They all played on the football team at Santa Barbara City College. On the night of the incident, they went to Isla Vista to go "party hopping" and meet girls. Tokio was using a crutch as the result of an injury he suffered in a game earlier that day. Spivey testified that he was talking to Tokio and Vereen when a "guy"

who acted "[l]ike he was high on something" asked if they had any drugs. Spivey responded no, and walked away. Spivey heard a loud noise, turned around, and saw the man lying on the ground.

Vereen denied arguing or fighting with anyone on the night the incident occurred, and did not believe that anyone in his group other than Tokio was wearing a red shirt. During football practice the following day, the team coach, Mr. Bolton, noticed that Tokio was not there. Vereen "went to him, not knowing that the situation was going to be as big as it is, and I was trying to take the heat off of one of my friends . . . because if coach Bolton was to find out that, you know, a star player was fighting in Isla Vista, then they would be kicked off, and because I wasn't a star player, I told him that I did it, and, you know, hoping that things would have been different, to help my friend." According to Vereen, Bolton responded, "you guys shouldn't have been in I.V. You guys know better than that, and I've told you guys repeatedly." Vereen said he lied to Bolton because "the only thing that I was thinking about was, okay, we got to keep A.J. [Tokio] on the team, and I'm trying not to get too much in trouble at the same time." He acknowledged that he was subsequently kicked off the team and sent home to Myrtle Beach because he "got smart mouthed" with Bolton.

Page testified that he did not see any of his teammates fighting or arguing with anyone. While he did recall someone approaching them and asking "if we had some weed or some cocaine," that was when Page starting throwing up from consuming too much alcohol.

### *Defense*

Leasau testified that he saw Vereen hit Lawrence while Tokio was standing nearby. Vereen and Page were "joking around with the guy" one minute, "and then Garry hit him and he fell down." Leasau saw Vereen "punch[] him in the face." As he and his roommates "fled the scene," Tokio took off his jersey and asked Leasau to "hide it" for him. He initially told the police he had not seen anything because he "didn't want to be the one to tell on anybody." He decided to come forward because "the truth needs to be

heard."

Tokio testified on his own behalf. He was 18 years old at the time of the incident. He suffered a leg injury during the game on October 21, and was given a knee brace and crutches. That night, Lawrence approached them and asked if they had any drugs. Tokio was "irritated" by the question, and told Lawrence to "get the hell out of here." Lawrence, who appeared to be very drunk, said something like, "Aren't all Black people supposed to sell drugs?" When Lawrence said this, "Garry had laid him out." Vereen "hit him straight, with a right" and then "fled the scene in milliseconds." Tokio explained that he took off his jersey "[b]ecause at that time, I knew that I was the last one standing at the crime scene, and fingers were being pointed at me, and at that time I was scared. I didn't know what to do, so I took off my jersey, I hand it to Andrew and told him to hide it." When the police detained them and recovered the jersey from Leasau, Tokio told them it belonged to him. He denied kicking Lawrence as he was lying on the ground. He did not urge Vereen to come forward and admit his involvement because he "despised him at the time."

#### *The Charges, Verdict, and Motion for a New Trial*

Tokio was initially charged with one count of battery causing serious bodily injury (§ 243, subd. (d)). After the preliminary hearing, the prosecution added the charge of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)).

During deliberations, the jury requested and was granted a read back of Lawson and Vereen's testimony. The jury subsequently returned verdicts finding Tokio guilty of the lesser included offense of simple battery on count 1 (§ 242), and guilty of assault as charged in count 2.

Tokio moved for a new trial alleging, among other things, that his trial attorney, Deputy Public Defender Rachel Solomon, had provided ineffective assistance by failing to call coach Bolton to testify about Vereen's confession to him. The motion noted the lengthy pretrial proceedings whereby Solomon sought to admit the confession

as a statement against penal interest pursuant to Evidence Code section 1230, based on the fact that Vereen was unavailable to testify at trial. The prosecution thereafter succeeded in locating Vereen in South Carolina, and brought him to California to testify. In testifying, Vereen acknowledged his confession to coach Bolton, then retracted it.

In moving for a new trial, Tokio asserted that Solomon should have thereafter sought to admit coach Bolton's testimony regarding the confession as a prior inconsistent statement under Evidence Code section 1235.<sup>3</sup> The motion stated that "[c]ounsel allowed herself [to] be pressured by the Court's impatience with the pace of the trial and to forego challenging its intimidated rulings that Coach Reggie Bolton's testimony would have been precluded or limited."

In hearing the motion, the court acknowledged it had pressured counsel "to keep the matter moving apace" and found it had thereby effectively induced the error. The court explained: "The issue regarding Coach Bolton's testimony was initially predicated on an admission-against-interest theory, and I required unavailability, and I made a pretrial determination that he could testify because the confessor, Mr. Vereen, was not available at that time. [¶] Then I think it was during jury selection, he became available. You got him from South Carolina, and that eliminated the unavailability issue and made it such that his testimony would not and could not be heard under [an] admission-against-interest theory, but I think Ms. Solomon was a bit at a disadvantage. [¶] She's now purporting a prior-inconsistent-statement theory, and Coach Bolton's testimony clearly would have been admissible under that theory, and the believability of Mr. Vereen's confession to having committed the act himself might have been viewed in a different light by the jury if they'd had that testimony, and that's my initial concern. [¶] And it seems to me as though Mr. Tokio was not afforded due process by virtue of that circumstance. It wasn't anybody's fault. I don't think it was ineffective assistance of

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<sup>3</sup> Evidence Code section 1235 provides in pertinent part: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing . . . ."

counsel, Ms. Solomon. It was just that in the rush of trial, that theory of admissibility . . . was not considered."

At the conclusion of the hearing, the trial court concluded that Tokio was entitled to a new trial in which coach Bolton's testimony is admitted pursuant to Evidence Code section 1235. The court reasoned: "The Court is charged with the duty of ensuring that the defendant receives a trial and is accorded due process in the trial proceeding. The way that the issue of Coach Bolton's testimony came about here, where we had pretrial hearings and his testimony was going to be admitted, there's admissions against interest because Mr. Vereen at that time was unavailable, the People couldn't obtain that witness, and the way circumstances thereafter developed, after we were in jury selection, the People were able to secure that witness, and that eliminated the unavailability issue regarding the prior statements against interest and the resulting confusion about whether Coach Bolton's testimony might otherwise be admissible and the Court's pressure to keep the matter moving apace have to be considered. [¶] In retrospect, it does seem as though calling Coach Bolton was essential to the case in light of Vereen's testimony that his confession to Bolton was a fabrication. Hearing the recanting of a confession without the confession can certainly be confusing to a jury, and indeed one of the jurors told defense investigators that he didn't believe that Vereen had confessed at all because Coach Bolton had not been brought in to verify that fact. [¶] Given all of those circumstances, I'm required to grant the motion for new trial."

## DISCUSSION

The People's opening brief identifies three grounds for reversing the trial court's order granting Tokio's motion for a new trial: (1) the court based its decision on the erroneous conclusion that the jury did not hear evidence regarding Vereen's confession; (2) that evidence, consisting of Vereen's testimony that he told coach Bolton "I did it," was sufficient and "would not appear to require much in the way of amplification to be understood;" and (3) the court erroneously found that Tokio's trial attorney provided ineffective assistance in failing to call coach Bolton to testify. None of

these claims has merit.

Section 1181 provides in pertinent part that a new trial may be granted "[w]hen the court . . . has erred in the decision of any question of law arising during the course of the trial . . . ." Our Supreme Court has made it clear that in cases in which the trial court grants a new trial order, the standard of review is abuse of discretion. (*People v. Ault* (2004) 33 Cal.4th 1250, 1255.) "The trial court's ruling on a motion for new trial ""rests so completely within [its] discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."" [Citations.] Although this standard of review is deferential, 'it is not empty . . . [I]t asks in substance whether the ruling in question "falls outside the bounds of reason" under the applicable law and the relevant facts [citations].' [Citation.] The appellant has the burden to demonstrate that the trial court's decision was 'irrational or arbitrary,' or that it was not ""grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue." [Citation.]" (*People v. Andrade* (2000) 79 Cal.App.4th 651, 659.) ""Where the motion is made on a proper statutory ground, and the record contains some showing in support of it, the judge's discretion in granting is almost invariably upheld; i.e., the appellate court gives the order all of the presumptions in favor of any appealable judgment." [Citation.]" (*Ibid.*)

The People fail to demonstrate that the court abused its discretion in granting Tokio a new trial. Contrary to their claim, the court's ruling is not based on an erroneous assumption that the jury was not presented with any evidence of Vereen's confession. The court merely recognized the jury may have evaluated that confession and Vereen's recanting of it differently had it heard from the individual to whom the confession was made. Ironically, the People identify the very problem the court alluded to in asserting that "[w]hether [Vereen's testimony about his confession] was sufficiently persuasive to allow the *jury* to entertain a reasonable doubt that Defendant Tokio, not Mr. Vereen, punched Mr. Lawrence was, of course, entirely an issue for the jury *itself* to resolve." The trial court had the opportunity to observe Vereen's testimony, and



concluded that the defense may have succeeded in impeaching the recanting of his confession had coach Bolton been allowed to testify. The record discloses no basis for us to reject that conclusion. "No matter how carefully we examine the record, no matter how thoughtful our reflections, we cannot evaluate the credibility of any witness to the same degree and with the same insight as the trial judge." (*People v. Callahan* (2004) 124 Cal.App.4th 198, 210-211.)

The People also assert that "Coach Bolton was not shown to have *relevant* evidence to offer that might have aroused a 'reasonable doubt' of Defendant's guilt in the minds of the jury." Tokio's motion, however, refers to interview transcripts in which coach Bolton offered details about Vereen's confession that Vereen did not testify to. Tokio asserted that coach Bolton "could have sown reasonable doubt" by, among other things, "[c]onfirming and clarifying Mr. Vereen's confession, giving it weight and damaging his explanation for making a false confession." He also offered that coach Bolton "had built in credibility and authority that the players did not," and noted that at least one juror had indicated that he may have viewed Vereen's confession differently had coach Bolton testified. While the People argue that it was "inappropriate for defense counsel to rely on the statements of a juror to, effectively, impeach the jury's verdict," the juror's statements were not offered for that purpose.

The record belies the People's assertion that the court erred in finding that Tokio's trial attorney had provided ineffective assistance in failing to call coach Bolton. The court expressly found that it had effectively induced the error by pressuring counsel "to keep the matter moving apace." In any event, the People's claim that an order granting a new trial on the ground of ineffective assistance of counsel should be subject to de novo review ignores our prior decision that such orders are reviewed for an abuse of discretion. (See *People v. Callahan, supra*, 124 Cal.App.4th at pp. 209-210.)

For the first time in their reply brief, the People assert that coach Bolton's testimony regarding Vereen's confession would not have been admissible as a prior inconsistent statement under Evidence Code section 1235, because he would have merely

"confirmed the truth of Mr. Vereen's testimony that Vereen had, indeed, come to him and offered an alibi for Tokio . . . ." This claim is waived because it was not raised in the opening brief. In any event, the claim is specious because Vereen's confession to coach Bolton that he assaulted Lawrence is plainly inconsistent with his trial testimony that he did not.

The People also argue for the first time in their reply brief that we "ought not to overlook the fact that there was considerable, and essentially uncontradicted, direct and circumstantial evidence identifying [Tokio] as the person who assaulted Mr. Lawrence." Even if this claim were not waived, it ignores our deferential standard of review, which requires us to affirm the court's order if there is any evidence supporting it. The record reflects that Reif Lawson was the only witness who testified that he actually saw Tokio hit Lawrence, yet he was unable to identify Tokio at trial and admitted telling the police that either Tokio or Vereen could have been the perpetrator. The record also reflects that the jury requested a read back of Lawson and Vereen's testimony. Moreover, the jury ultimately found Tokio not guilty of committing felony battery. All of these circumstances support the court's finding that it had erred as a matter of law in failing to allow coach Bolton to testify.

In reaching our conclusion, we are mindful that "trial courts have a strong incentive not to crowd their dockets and squander limited judicial resources by ordering unnecessarily that cases over which they presided, and which have already been taken to verdict, be retried. We are confident that motions for such relief are examined with considerable care." (*People v. Ault, supra*, 33 Cal.4th at p. 1271, fn. omitted.) After careful consideration, the trial court concluded that this case presents one of those occasions when a new trial is warranted. Moreover, the court based its decision on a proper statutory ground, and the record contains evidence supporting that decision. Accordingly, there is no basis for us to conclude that the trial court abused its discretion in granting Tokio a new trial. (*People v. Andrade, supra*, 79 Cal.App.4th at p. 659.)

The order granting Tokio's motion for a new trial is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Frank J. Ochoa, Judge  
Superior Court County of Santa Barbara

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